45603 SERVICE DATE – MARCH 6, 2017
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36065

SAN PEDRO PENINSULA HOMEOWNER'S UNITED INC., JOHN TOMMY ROSAS, TRIBAL ADMINISTRATOR, TONGVA ANCESTRAL TERRITORIAL TRIBAL NATION—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board denies the petition of San Pedro Peninsula Homeowner's United Inc. and John Tommy Rosas for a declaratory order regarding certain rail movements associated with the Port of Los Angeles Harbor Department and Rancho LPG Holdings, LLC, but provides guidance on application of federal preemption under 49 U.S.C. § 10501(b).

Decided: March 3, 2017

On September 12, 2016, San Pedro Peninsula Homeowner's United Inc. and John Tommy Rosas, Tribal Administrator, Tongva Ancestral Territorial Tribal Nation (collectively, SPPHU), filed a petition requesting that the Board issue a declaratory order addressing a "temporary rail permit" issued by the Port of Los Angeles Harbor Department to Rancho LPG Holdings, LLC (Rancho LPG), a corporate affiliate and subsidiary of Plains All-America Pipeline (Plains) (collectively, Rancho), which SPPHU states governs the use of a rail spur to access a liquefied petroleum gas storage facility owned by Rancho LPG. SPPHU seeks a Board finding regarding Rancho's transportation of hazardous materials on the rail spur and whether a permit was used without required state environmental review. (See SPPHU Pet. 1, 5.)

Letters in support of SPPHU's petition were filed by Congresswoman Janice Hahn, on October 25, 2016; San Pedro and Peninsula Homeowners Coalition on October 28, 2016; and June Burlingame Smith on October 28, 2016. Pacific Harbor Line, Inc. (PHL), and Rancho filed replies to SPPHU's petition on October 31, 2016.[2] Also on October 31, 2016, the City of Los Angeles (City), acting by and through the Board of Harbor Commissioners (Harbor

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] By decision served September 30, 2016, the deadline for replies to SPPHU's petition was extended to October 31, 2016.

Department),[3] replied to SPPHU's petition, requesting clarification on its understanding that federal preemption under 49 U.S.C. § 10501(b) applies to actions taken by the Harbor Department that affect rail transportation. Replies to City's Reply were filed by SPPHU, PHL, and Rancho. On December 7, 2016, SPPHU submitted a supplemental filing.[4]

For the reasons discussed below, the Board will deny SPPHU's request for a declaratory order but will provide guidance on the issue of § 10501(b) preemption.

BACKGROUND

Rancho LPG owns and operates a liquefied petroleum gas storage facility located in the Port of Los Angeles area of San Pedro, Cal. The storage facility is used to store butane and propane and includes two 12.5 million gallon refrigerated tanks and five 60,000 gallon horizontal storage tanks. (Rancho Reply 2, Oct. 31, 2016.) PHL provides rail service to the facility over tracks owned by the City,[5] including the subject track that was constructed by the original owner of the facility (the Track). (City Reply 7.) The Track is now used by Rancho LPG, pursuant to a permit, Revocable Permit No. 10-05 (RP 10-05), issued by the Harbor Department.[6] Under the terms of RP 10-05, "[Rancho LPG] may not handle, use, store, transport, transfer, receive or dispose of, or allow to remain on the premises . . . any substance classified as a hazardous material under any federal, state, local law or ordinance . . . in such quantities as would require

[3] In its petition, SPPHU refers to the City and Harbor Department as "the Port of Los Angeles." For the purposes of this proceeding, the Board will refer to the Port of Los Angeles as the Harbor Department.

[4] Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will accept the November 8, 2016 and December 7, 2016 filings of SPPHU and the November 21, 2016 filings of PHL and Rancho into the record.

[5] See Pac. Harbor Line, Inc.—Operation Exemption—Port of Los Angeles, FD 33411 (STB served Dec. 2, 1997); City of Los Angeles—Acquis. Exemption—Rail Lines of Atchison, Topeka & Santa Fe Ry., FD 32427 (ICC served Jan. 12, 1994).

[6] The petition pertains to track covered by a "Temporary Rail Permit" issued by the Harbor Department to Rancho LPG. SPPHU cites "Revocable Rail Spur Permit No. 110" (SPPHU Pet. 5, SPPHU Reply 2, Nov. 8, 2016), but the record contains no evidence of, or other reference to, such a permit. However, SPPHU refers to a permit that has been extended for 42 years and attaches as an exhibit Revocable Permit No. 1212 (RP 1212), which was issued by the Harbor Department in 1974 to Petrolane, Inc., a predecessor company to Rancho LPG, and which governed the construction and use of the Track. The record shows that RP 10-05 is a successor to RP 1212 (SPPHU Pet., Ex. 3 at 2) and is the only existing contractual agreement between the Harbor Department and Rancho LPG. (Id.; City Reply 7; Rancho Reply 3, Nov. 21, 2016.) Both RP 1212 and RP 10-05 pertain to the Track, described in both permits as "Parcel No. 1" depicted in Harbor Engineering Drawing No. 5-4327. Further, only RP 10-05 contains language governing the transportation of hazardous materials. Accordingly, the Board will view RP 10-05 as the permit that pertains to the Track.

the reporting of such activity to any person or agency having jurisdiction thereof without first receiving written permission of City." (City Reply, Ex. 5, City of Los Angeles Harbor Department Revocable Permit No. 10-05, at 6.)

SPPHU contends that, in violation of the permit's terms, Plains and Rancho LPG have continually moved hazardous materials on the Track. (SPPHU Pet. 1.) SPPHU further asserts that, by not submitting this "temporary" revocable permit to the Board "for a ruling," the Harbor Department and Rancho have evaded the duty to assess the risk of transporting hazardous materials in a "Risk Management Plan" and through an updated California state Environmental Impact Report (EIR).[7] (Id. at 1, 2, 4, 5.) Thus, it appears that SPPHU is requesting that, because the Board has exclusive jurisdiction over the Track, the Board issue a declaratory order finding that the transportation of hazardous materials over the Track "without an updated EIR" violates the terms of the revocable permit. (See SPPHU Pet. 5.)

In its reply, Rancho asserts that SPPHU has failed to present a specific controversy for the Board to resolve. (Rancho Reply 3-4, Oct. 31, 2016.) Both Rancho and PHL assert that the Track is not subject to state or local environmental regulation because the Track is subject to the Board's exclusive jurisdiction. (Rancho Reply 4-5, Oct. 31, 2016; PHL Reply 2-4, Oct. 31, 2016.) The City likewise asserts that the Board has jurisdiction over the Track and that PHL, the operator of the Track, is a common carrier. (City Reply 9.) The City seeks clarification on whether it is therefore preempted from taking any action that would unreasonably interfere with rail service, including terminating or suspending rail service to the facility, adding additional regulation of rail tank cars that move product from the facility through the area beyond that imposed by federal law, or taking any other action that would improperly burden interstate commerce. (City Reply 10.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. See Intercity Transp., Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). For the reasons explained below, the Board will deny SPPHU's request for a declaratory order, but will provide guidance on the preemption issues that are relevant to the circumstances presented here.

The Interstate Commerce Act, as amended by the ICC Termination Act of 1995, provides that the Board's jurisdiction over "transportation by rail carriers" is "exclusive" and that "the remedies provided under 49 U.S.C. §§ 10101-11908 with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b); see Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1097-98 (9th Cir. 2010). The primary purpose of § 10501(b)'s broad preemption

[7] According to Exhibit 3 of SPPHU's petition, an EIR is an Environmental Impact Report, which, under the California Environmental Quality Act (CEQA), is required for certain state and local activities or construction. (SPPHU Pet., Ex. 3 at 1.)

provision is to prevent a patchwork of state and local regulation from interfering with interstate commerce. See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08 (noting the need for "uniformity" of federal standards for railroads and the risk of "balkanization" from state and local regulation). The preemptive effect of § 10501(b) is broad and sweeping, and "'[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

Courts and the Board have found that state or local actions that "'have the effect of managing or governing,' and not merely incidentally affecting, rail transportation are expressly or categorically preempted" under § 10501(b). Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012) (quoting Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 410 (5th Cir. 2010) (en banc)).[8] Two broad categories of state and local actions are subject to this per se form of preemption: (1) state or local permitting or preclearance requirements (including environmental requirements generally) that could be used to deny a railroad the ability to conduct some part of its operations or proceed with activities that the Board has authorized; and (2) state or local regulation of matters that are directly regulated by the Board—such as the construction, operation, and abandonment of rail lines (see 49 U.S.C. §§ 10901-07); railroad mergers, line acquisitions, and other forms of consolidation (see 49 U.S.C. §§ 11321-28); and railroad rates and service (see 49 U.S.C. §§ 10501(b), 10701-47, 11101-24). Franks, 593 F.3d at 410-11; City of Auburn, 154 F.3d at 1027-31.

State or local actions that are not categorically preempted still may be preempted "as applied" if they would have "the effect of unreasonably burdening or interfering with rail transportation." Franks, 593 F.3d at 414. This requires a fact-specific determination based on the circumstances of each case. See Adrian & Blissfield R.R. v. Vill. of Blissfield, 550 F.3d 533, 540 (6th Cir. 2008). Preemption applies to attempted regulation of railroad operations and facilities even where the Board does not license and/or actively regulate the activity involved. See Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188-89 (10th Cir. 2008); Green Mountain R.R. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005).

Although preemption is broad, it is not unlimited. States and localities retain their police powers to protect the public health and safety. Ass'n of Am. R.Rs., 622 F.3d at 1098; Green Mountain, 404 F.3d at 643. Thus, nondiscriminatory regulations of general applicability (e.g., building, fire, and electrical codes) are not preempted, as long as they do not unreasonably interfere with rail transportation. Id. Federal statutes, including environmental statutes and statutes regulating hazardous materials by rail, are also given effect unless they irreconcilably

[8] See also City of Auburn, 154 F.3d at 1027-31; DesertXpress Enterprises, LLC—Pet. for Declaratory Order, FD 34914, slip op. at 5 (STB served June 27, 2007) (holding that CEQA is preempted as it relates to a project within the Board's jurisdiction); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 7 (STB served Mar. 14, 2005) (finding that § 10501(b) preempted a local act that sought to govern the transportation of hazardous materials by rail through Washington, D.C.).

conflict and cannot be harmonized with the Interstate Commerce Act. Ass'n of Am. R.Rs., 622 F.3d at 1097; Tyrrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001) (Federal Railway Safety Act not preempted).

Here, it is uncontested that the track at issue is subject to the exclusive jurisdiction of the Board under § 10501(b).[9] (See SPPHU Pet. 1, 4; Rancho Reply 4, Oct. 31, 2016; PHL Reply 3, Oct. 31, 2016; City Reply 7, 9.) It is also uncontested that PHL is a common carrier railroad operating on track subject to the Board's jurisdiction. As a result, state entities such as the City and the Harbor Department are preempted from imposing requirements that could be used to restrict these rail operations. The Board has also made clear that rail carriers have not only a right, but a statutory common carrier obligation, to transport hazardous materials upon reasonable request. See Union Pac. R.R.—Pet. for Declaratory Order, FD 35219, slip op. at 4 (STB served June 11, 2009); see also Strohmeyer—Acquis. & Operation Application—Valstir Indus. Track in Middlesex & Union Ctys., N.J., FD 35527, slip op. at 2 (STB served Oct. 20, 2011), aff'd sub nom. Riffin v. STB, 733 F.3d 340 (D.C. Cir. 2013) (upholding Board's determination that railroads have a common carrier obligation to carry hazardous materials). Therefore, any terms in the temporary rail permit that attempt to restrict rail operations, including the transportation of hazardous materials, are preempted.[10] Lastly, SPPHU suggests that the Harbor Department was required to submit the permit to the Board. However, while RP 10-05 pertains to track subject to the Board's jurisdiction, the Harbor Department was not required to submit the permit to the Board, as SPPHU suggests. (SPPHU Pet. 1.)

For these reasons, SPPHU's request for a declaratory order is denied.

It is ordered:

1. SPPHU's petition for declaratory order is denied.

---

[9] SPPHU describes the track at issue as a "rail spur line." The relevant permits also refer to the track at issue as an "industrial rail spur track." However, Rancho contends that the Track is a line of railroad subject to entry and exit licensing under 49 U.S.C. § § 10901 and 10903, as opposed to excepted spur track under 49 U.S.C. § 10906, by virtue of the Board's having authorized PHL to operate over the Track. (Rancho Reply 2-5, Nov. 21, 2016.) The Board has jurisdiction over both railroad lines subject to Board licensing and excepted spur track. 49 U.S.C. § 10501(b)(2). Thus, federal preemption applies regardless of whether the track at issue is a line of railroad or a spur under § 10906.

[10] This does not leave the transport of hazardous materials over the Track unregulated. Other federal agencies, including the Federal Railroad Administration, the Transportation Security Administration, and the Pipeline and Hazardous Materials Safety Administration, have statutory responsibilities to regulate the transportation of hazardous materials by rail, and that regulation typically applies notwithstanding § 10501(b) preemption. See Tyrrell v. Norfolk S. Ry., 248 F.3d at 523; Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 7 (STB served May 15, 2015).

2. This decision is effective on the date of service.

By the Board, Board Members Begeman, Elliott, and Miller.